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ARKANSAS COURT OF APPEALS

DIVISION I

No. CACR07-468

QUABINA RASHEEN PENSON
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered JUNE 25, 2008

APPEAL FROM THE CRITTENDEN
COUNTY CIRCUIT COURT,
[NO. CACR-2003-984R]

HONORABLE RALPH WILSON, JR.,
JUDGE

MOTION TO WITHDRAW DENIED;
REBRIEFING ORDERED

ROBERT J. GLADWIN, Judge

This is a no-merit appeal from the revocation of appellant's suspended sentence. Appellant Quabina Rasheen Penson pled guilty to sale or delivery of cocaine on July 20, 2004, for which he was sentenced to ninety-six months' imprisonment in the Arkansas Department of Correction, followed by a thirty-six month suspended sentence, and assessed costs in the amount of \$500. Penson was released on June 28, 2006, and the State filed a petition to revoke the suspended imposition of sentence on August 28, 2006, alleging that Penson violated the conditions of the suspension by: (1) failing to pay fines, costs, and fees; (2) failing to report to parole as directed; (3) failing to pay supervision fees; (4) failing to notify the sheriff and parole officer of his current address and employment; (5) violating conditions of his parole; (6) possessing cocaine with intent to sell. The trial court granted Penson's

motion for directed verdict as to grounds two through five, but denied the motion as to grounds one and six. The directed-verdict motion was not renewed at the close of Penson's case,¹ and the trial court found by a preponderance of the evidence that Penson inexcusably failed to comply with the condition, which required him to pay all fines, costs, and fees, and that he failed to comply with the condition, which required him to live a law-abiding life in that he committed the crimes of possession of a controlled substance, resisting arrest, and fleeing. On October 24, 2006, the trial court sentenced Penson to eighteen-years' imprisonment. Penson filed a timely notice of appeal.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Rules of the Supreme Court and Court of Appeals, Penson's counsel filed a motion to withdraw on the ground that an appeal in this matter would be wholly without merit. An attorney's request to withdraw from appellate representation based upon a meritless appeal must be accompanied by a brief that contains a list of all rulings adverse to his client that were made on any objection, motion, or request made by either party. *Eads v. State*, 74 Ark. App. 363, 47 S.W.3d 918 (2001). The argument section of the brief must contain an explanation of why each adverse ruling is not a meritorious ground for reversal. *Id.* This court is bound to perform a full examination of the proceedings as a whole to decide if an appeal would be wholly frivolous. *Campbell v. State*, 74 Ark. App. 277, 47 S.W.3d 915 (2001). If counsel fails

¹Following our supreme court's ruling in *Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001), the requirements of Rule 33.1 of the Arkansas Rules of Criminal Procedure regarding motions for dismissal and directed verdicts do not apply to revocation hearings.

to address all possible grounds for reversal, this court can deny the motion to withdraw and order rebriefing. *Sweeney v. State*, 69 Ark. App. 7, 9 S.W.3d 529 (2000).

Penson was provided a copy of his counsel's first no-merit brief and was notified of his right to file a list of points on appeal within thirty days. He filed no points. The State did not file a responsive brief due to the absence of pro se points.

On January 23, 2008, this court ordered rebriefing because Penson's counsel's no-merit brief failed to list all adverse rulings with respect to the objections made during Penson's revocation hearing. *See Penson v. State*, No. CACR 07-468, (Ark. App. Jan. 23, 2008). Upon rebriefing, Penson's counsel again has filed a no-merit brief, and Penson has failed to file a pro se brief in this matter after having been given the opportunity to do so. The State did not file a responsive brief due to the absence of pro se points.

Again, counsel fails to address each adverse ruling with respect to the objections made by him at trial. Rule 4-3(j)(1) dictates the contents of a no-merit brief:

A request to withdraw on the ground that the appeal is wholly without merit shall be accompanied by a brief including an abstract and Addendum. The brief shall contain an argument section that consists of a list of all rulings adverse to the defendant made by the circuit court on all objections, motions and requests made by either party with an explanation as to why each adverse ruling is not a meritorious ground for reversal. The abstract and Addendum of the brief shall contain, in addition to the other material parts of the record, all rulings adverse to the defendant made by the circuit court.

As we have oftentimes stated, it is imperative that counsel follow the appropriate procedure when filing a motion to withdraw as counsel. *Walton v. State*, 94 Ark. App. 229, 228 S.W.3d 524 (2006). In furtherance of protecting the constitutional rights of an appellant, it is the duty

of both counsel and this court to perform a full examination of the proceedings as a whole to determine if an appeal would be wholly frivolous. *Id.*

Accordingly, counsel is directed to file a brief on the merits or one that complies with Ark. Sup. Ct. R. 4-3(j)(1). If a no-merit brief is filed, counsel's motion and brief will be forwarded by the Clerk to appellant so that, within thirty days, he again may raise any points he chooses in accordance with Ark. Sup. Ct. R. 4-3(j)(2). Counsel's motion to withdraw is denied, and the case is remanded for rebriefing.

Motion to withdraw denied; rebriefing ordered.

PITTMAN, C.J., and VAUGHT, J., agree.